INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	4
Conclusion	6
Cases:	
Brinegar v. *United States*, 338 U.S. 160	5
Carroll v. *United States*, 267 U.S. 132	5
Draper v. *United States*, 358 U.S. 307	5
Roviaro v. *United States*, 353 U.S. 53	5, 6
Scher v. *United States*, 305 U.S. 251	5, 6
Statutes:	
Internal Revenue Code of 1954 (26 U.S.C.):	
Section 5205	2
Section 5601	2
Section 5604	2

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 528

WILLIE BRUNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 84–89; Pet. App. 11–14) is reported at 293 F. 2d 621.

JURISDICTION

The judgment of the court of appeals was entered on September 1, 1961 (R. 84, 88; Pet. App. 11, 15). A petition for rehearing was denied on October 2, 1961 (R. 98; Pet. App. 16). The petition for a writ of certiorari was filed on October 31, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether law enforcement officers had probable cause to halt and search petitioner's automobile for untaxed liquor.

2. Whether the government was required to disclose the name of a confidential informer who was not a participant in the criminal activity and was not present at the time of petitioner's arrest.

STATEMENT

A two-count indictment, returned in the United States District Court for the Northern District of Florida, charged petitioner with possession and transportation of untaxed liquor, in violation of 26 U.S.C. 5205, 5601 and 5604 (R. 1-2). Petitioner waived a trial by jury. Following trial, the court found petitioner guilty as charged, and on December 14, 1960, sentenced him to a general term of imprisonment of eighteen months (R. 74–75). On appeal, the conviction was affirmed (R. 84–87; Pet. App. 11–14).

Before trial, petitioner filed a motion to suppress evidence obtained at the time of his arrest on the ground that it was the product of an illegal search and seizure. Pursuant to stipulation by counsel for each side, the court agreed to hear the evidence in support of the motion at the same time that the case was tried and to treat the testimony on the motion as the testimony in chief.

The pertinent facts may be summarized as follows:

On June 17, 1960, a "confidential informer" telephoned Mr. B. H. Jones, a Florida Beverage Enforcement Agent operating out of Marianna, Florida, and said that he had some information (R. 33). At about

6:30 p.m. that evening, Agent Jones met with the informer, who told him that a 1957 Ford automobile with Florida license tags would be involved in the pick-up of some whiskey in the "Bates settlement" area at sometime before midnight that evening, that petitioner "would possibly" be driving the automobile, but that "any other white male or any other person" could be driving it (R. 33–34, 37, 41; see R. 15, 23). The "Bates settlement" area, which is located in Calhoun County, about eighteen to twenty miles from Marianna, Florida, had a reputation for being an area where illicit whiskey was manufactured (R. 24, 38).

At about 9:30 p.m., Agent Jones, together with another state agent and a federal agent, entered the Bates area. A 1957 Ford automobile, fitting the description furnished by the informer (R. 14–15, 28–29), approached the agents at a speed of about 15 to 20 miles per hour (R. 13–14, 26, 27–28, 40–42, 45–46, 49). When the Ford drew near the agents' car, it burst into a "very high rate of speed" (R. 15–16; see R. 29). The agents pursued the Ford down a curving, dirt road for a few miles at speeds of about 70 to 80 miles per hour where there were no curves (R. 16–17; see R. 29–30, 68), and in excess of 100 miles per hour after the automobile turned into a highway (R. 18, 30–31; see R. 67–68). When the Ford slowed down for a sharp curve, the agents drew near in their car and sounded a siren (R. 21, 30–31). The Ford then pulled over to the side of the road and stopped.

Agent Jones walked over to the Ford and flashed a light into the front seat. There he saw petitioner and

the neck portion of a five gallon jug which was protruding from a sugar bag on the floor to the right of petitioner (R. 32–33; see R. 21–22; 44–45). He did not observe any tax stamps on the neck portion of the jug (R. 33). Shortly thereafter, Agent Jones and the federal agent examined the jug. They ascertained that the jug contained untaxed whiskey (R. 25, 32–33). The federal agent then placed petitioner under arrest for the possession of non-tax-paid spirits (R. 21–22, 25, 67).

During the proceedings in the district court, counsel for petitioner asked Agent Jones to supply the name of the confidential informer. Government counsel objected, and the court sustained the objection (R. 35–36). Subsequently, petitioner testified that he had possessed "moonshine" whiskey on the night of his arrest and that he had picked up the whiskey which he had known was located near the side of a road (R. 45, 56).

ARGUMENT

1. The agents had probable cause to stop the car. The information given by the informer that a 1957 Ford would be leaving the "Bates settlement" area before midnight on June 17, 1960, with whiskey, was corroborated to the extent that the agents did in fact see a 1957 Ford automobile leave the "Bates settlement" area before midnight on June 17, 1960. When, on approaching the agents' car, the Ford suddenly accelerated its speed to beyond 100 miles an hour on the highway, the agents could reasonably believe that the informant's information that the car would be carrying illegal whiskey was correct. The informa-

tion received from the informer, when corroborated by the facts perceived, constituted probable cause justifying the stopping and search of the car. See *Draper* v. *United States*, 358 U.S. 307, 312–313; *Carroll* v. *United States*, 267 U.S. 132; *Brinegar* v. *United States*, 338 U.S. 160.

2. There is no merit to petitioner's contention (Pet. 8–10) that the trial court erred when it sustained the government's objection to petitioner's question of Agent Jones, which was designed to elicit the name of the confidential informer. Although it is settled law that the government's privilege of nondisclosure of the identity of an informer who supplied information must give way where the identity of the informer or the contents of his communication is "relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause" (*Roviaro* v. *United States*, 353 U.S. 53, 60–61; *Scher* v. *United States*, 305 U.S. 251, 254), in the present case no showing was made that the informer's identity would be relevant and helpful to the defense or would be essential to a fair trial, and the record affirmatively indicated that the informer's identity was not material to the case or petitioner's defense. Petitioner testified that he had picked up the whiskey on the night in question, with knowledge where it would be located, and that it was in his automobile at the time of his arrest. The in-

former did not participate, as in *Roviaro*,[1] in the events on the night of the petitioner's arrest, which the agents witnessed themselves and which constituted the crime. The source of the information which caused the agents to patrol the road in question was immaterial to petitioner's defense. See *Scher* v. *United States*, *supra*, 305 U.S. at 254.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER 1961.

[1] In *Roviaro*, the informer was the sole participant, other than the accused, in the narcotics transactions charged, and was the only witness other than the defendant in a position to amplify or contradict the testimony of government witnesses. Nondisclosure of his identity, therefore, was deemed harmful to the defendant in his preparation and presentation of his defense. 353 U.S. at 63–65.

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